NOV 1 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-528

HELEN FAYE GENERES, *Petitioner*

vs.

EUGENE D. STICH, et al., and the CALIFORNIA COURT OF APPEAL
STATE OF CALIFORNIA, *Respondents*

PETITION FOR AN ALTERNATIVE WRIT OF PROHIBITION

and/or

PETITION FOR A WRIT OF CERTIORARI

to the California Court of Appeal
Third Appellate District

HELEN FAYE GENERES
2538 Waldon Street
Redding, California 96001
Telephone (916) 243-0586
Petitioner.

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In the Supreme Court

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OCTOBER TERM, 1974

No.

HELEN FAYE GENERES, *Petitioner*

VS.

EUGENE D. STICH, et al., and the CALIFORNIA COURT OF APPEAL STATE OF CALIFORNIA, *Respondents*

MOTION FOR LEAVE TO FILE AND FOR

PETITION FOR AN ALTERNATIVE WRIT OF PROHIBITION and/or PETITION FOR A WRIT OF CERTIORARI to the California Court of Appeal Third Appellate District

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The Petitioner, Helen Faye Generes, prays that an Alternative Writ of Prohibition and/or a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California of September 12, 1974, after judgment of the Court of Appeal, Third Appellate District, on July 18, 1974 that vacated its April 24, 1974 order that granted petitioner's motion to dismiss the untimely appeal, which was upheld by the Supreme Court of California.

OPINIONS BELOW

The judgments of the Supreme Court and the Court of Appeal were without opinion and are attached as Appendix A and B. Certified copies of the Judgment, Motion for New Trial Denied,

and Folio of Register of Civil Actions are attached as Appendix C, D and E—respectively.

JURISDICTION

The Supreme Court of the State of California denied a Petition for Hearing, without opinion, on September 12, 1974. The jurisdiction of This Court is invoked under 28 U. S. C. Section 1257; and 28 U. S. C. Section 1651.

QUESTIONS PRESENTED

The statutory procedural requirements both Federal and State are jurisdictional and mandatory. Petitioner has exhausted her State remedies. The Court of Appeal has acted beyond, and will continue to act in excess and without jurisdiction unless prohibited by This Court. The Constitutional question of the Untimely Appeal was raised in a Motion to Dismiss the Appeal in The California Courts. The Court of Appeal granted petitioner's motion to dismiss the appeal. Thereafter, appellants substituted attorneys, and the Court of Appeal, without opinion, 84 days, almost three months later, vacated their order of April 25, 1974 that dismissed the appeal in Violation of Fifth and Fourteenth Amendment Guarantees.

1. Whether it is a Denial of Equal Protection and Due Process and Violates Fundamental Constitutional Rights under the Fourteenth Amendment for the Court of Appeal to make a decision in direct conflict with all the case law decisions in every other appellate court of California that have been Upheld by the Supreme Court of California that state an Untimely Appeal must be dismissed.

2. Whether it is a Denial of Equal Protection and Due Process and Violates Fundamental Constitutional Guarantees under

the Fourteenth Amendment for the Courts to Arbitrarily and Capriciously discriminate in the application of the law against a lay person who acts as her own lawyer, to deprive her of her rightful earnngs from a lawful occupation and a livelihood to favor a famous attorney who makes his money fighting lawsuits?

Constitutional and Statutory Provisions Involved

28 U.S.C. Section 1257:

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court by . . . writ of certiorari."

28 U.S.C. Section 1651:

(a) The Supreme Court may issue all writs necessary or appropriate in aid of respective jurisdiction.

(b) An alternative writ of prohibition may be issued.

Constitution of the United States, Amendment XIV:

". . . no State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case involves the following statutes of the State of California.

California Code of Civil Procedure 664.5 as set forth in California rules of Court: Rule 2:

". . . notice of appeal shall be filed within 60 days after the date of mailing notice of entry of judgment by the clerk of the court pursuant to section 664.5 of the Code of Civil Procedure . . ."

Rule 3: "When a valid notice of intention to move for a new

trial is *served* and *filed* by any party, and the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion . . ."

California Code of Civil Procedure Section 1013:

"expressly removes any time extending effect of mail service of notice of entry of judgment and the time for filing notice of appeal."

California Rules of Court Rule 45 (c) and (e):

"The time for filing a notice of appeal shall not be extended." "The reviewing court for good cause may relieve a party from default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal."

STATEMENT OF THE CASE

Introduction.[1]

Procedural History and Facts:

On December 5, 1974 the Judgment was served and entered. Appendix C. The motion for new trial was not valid as it was not served. It did not extend the time to appeal from the judgment. The Court made and signed its written order that the motion for new trial was denied on January 7, 1974, Appendix D.

[1]Petitioner, a licensed real estate broker, under an exclusive listing sold a beer and wine distributorship. The buyer and seller executed a legal binding contract. The broker's commission was $20,439.30. The buyer quit his job in southern California, sold his home, and moved his family and furniture to Redding. After obtaining their Federal and State licenses and permits to operate the business, they demanded a covenant not to compete that was not in the sales contract. The buyers—the Stitches—served notice of recission. The Trial Court found the buyer and seller acted in collusion and "bad faith." The buyers—Stitches—filed a complaint against petitioner-broker. They did not sue the seller. Judgment was in favor of broker for $20,439.30 against seller. Buyers—Stiches—filed an appeal against judgment in favor of petitioner.

It was entered in the Register of Civil Actions January 7, 1974. Appendix E-1. The original order is filed in its proper sequence under date of January 7, 1974 in the Court's Permanent Minute Book 95, Department I. On February 7, 1974 the appellants filed a notice of appeal. The time to appeal from the judgment expired on February 3, 1974. Had the motion for new trial been valid, it was still untimely. Thirty days from January 7th, 1974 is February 6th, 1974. This was one day too late. All the parties relied on the January 7, 1974 written order as the date the time commenced to run for appeal including the Trial Court. After the notice of appeal was filed a "yellow copy" of the order in the clerk's case file was stamped with a rubber file stamp date of January 9, 1974. See Appendix E-2.

On February 26, 1974 petitioner filed a motion to dismiss the appeal and on March 5, 1974 the Trial Court ruled: The motion to dismiss is denied in this Court for want of jurisdiction, without prejudice, to bringing the matter to the attention of the District Court of Appeal and quoted: 'Where a notice of appeal is untimely, the *appellate* court on its own motion must dismiss the appeal. *Nu-Way Associates Inc. v. Keefe* (1971) 15 CA 3rd 926 at 928.'"

On April 25, 1974 Petitioner filed a Motion to Dismiss in the Court of Appeal. On April 25th, 1974 the Court granted the Motion to Dismiss the Untimely Appeal, and on May 9th, 1974 denied appellants Petition for ReHearing.

On June 26, 1974 Appellants substituted counsels and on July 18, 1974 the Court of Appeal vacated their April 25, 1974 order that dismissed the appeal, without opinion. Petitioner filed a Petition for rehearing, it was denied. Petitioner filed a Petition for Hearing in Supreme Court and it was denied. Appendix A and B. Petitioner has exhausted her remedies in the State Courts.

REASONS FOR GRANTING THE WRIT

It is a Denial of Equal Protection and Due Process and Violates Fundamental Constitutional Rights under the Fourteenth Amendment for the Court of Appeal to Make a Decision in Direct Conflict with All the Case Law Decisions in Every Other Appellate Court of California that Have Been Upheld by the Supreme Court of California that state an Untimely Appeal must be Dismissed.

"The power to relieve against excusable delay in complying with procedural requirements relating to appeals does not extend to delay in the taking of an appeal which is jurisdictional." *Estate of Hanley* (1934), 149 ALR 1250; 145 P2d 423; 23 C2d 120, 123; *Stegmann v. Holder* (1963), 223 CA2d 531 at 535; 36 Cal. Rptr. 1. *Desherow v. Rhodes* (1969), 1 CA3d 733; 82 Cal. Rptr. 138 at 141; the Court said, "The failure of the clerk to stamp the date on the order at the time he was instructed to do so does not prevent the effective entry of the order on the date the judge ordered it to be entered."

There have been only two exceptions in Civil Cases in published California Law Decisions. In the *Slawinski v. Mocettini* (1965), 63 C2d 70; 45 Cal. Rptr. 15, the date typed on the order was incorrect and the court said the parties were entitled to rely on the written order of the judge denying the new trial. And in the *Morrow* case (1970) 9 CA2d 39, 88 Cal. Rptr. 142 there was no opposition to the untimely appeal until it was raised in the reply brief. The court ruled this was a waiver of objection by failure to protest. *In the case at bar, the date typed on the order was correct and petitioner has protested strenuously.* All parties relied on the January 7th, 1974 date of entry.

All the published case law decisions re-emphasize that a departure from the strict requirement of timely notice of appeal can succeed only in highly unusual and factually compelling cases.

An attempt to rationalize this further appears in *Thompson, Curtis, Lawson and Parrish v. Thorne* (1971) 21 CA3d 797; 98 Cal. Rptr. 753 in which the Court said that quasi-estoppel requires that the appellant establishes (1) that he was justifiably in doubt regarding the time within which the notice was required to be filed; and (2) that this doubt was caused by his reliance upon some conduct by the respondent, *at least some part of which occurred prior to the filing of the notice.* There is no estoppel in the case at bar. Appellants counsel is just trying to pull a fast one. see California Civil Appellate Practice Supplement, CEB, Author Edward L. Lascher (July 1974) page 20 section 3.96 and page 42 section 10.12: in which he quotes *Desherow v. Rhodes supra.* "Failure of the clerk to stamp the date filed on the order . . . *does not prevent the effective entry of the order.*"[2]

It is a Denial of Equal Protection and Due Process and Violates Fundamental Constitutional Guarantees under the Fourteenth Amendment for the Courts to Arbitrarily and Capriciously Discriminate in the Application of the law Against a Lay Person who Acts as Her Own Lawyer, to Deprive Her of her Rightful Earnings from a Lawful Occupation and a Livelihood to favor a Famous Attorney Who Makes his Money Fighting Lawsuits.

The Court of Appeal was discriminatory and arbitrary when they reversed the decision that dismissed the appeal. The Fourteenth Amendment prohibits any State from taking an action which would deny to any person within its jurisdiction the equal protecton of the laws.

After the Court of Appeal granted petitioner's motion to dismiss the appeal, appellants employed an additional counsel, Mr.

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[2]". . . . the Shasta County Clerk's Office was shaken not too long ago by the still unsolved theft or embezzlement of a healthy chunk of county funds." Record-Searchlight—June 28, 1974. (Over $1000.00.)

Edward L. Lascher, a famous appellate specialist, and Editor of the California State Bar Journal; and Author of California Civil Practice (July 1974) Supplement—Continuing Education of the Bar. Mr. Lascher threw his weight around and obtained the reversal. The reversal was without opinion. There were no grounds under the applicable California laws for reversal. The California Appellate Courts failed to make an independent de novo examination of the facts as required by the doctrine of Constitutional Fact—Appendix C, D, E-1-2, F, or they would have been compelled to uphold its decision that dismissed the appeal. The appellate judges were biased and prejudiced as they must have thought because Lascher is a "bigwig", he's right and discriminated and ignored petitioner, a lay person, who acted as her own lawyer. The Courts in its efficiency to eliminate motions on its docket swept justice under the rug while the good published law remains on the books.

This Court is requested to take judicial notice of Mr. Lascher's Editorial in the September-October 1974 issue of the California State Bar Journal, page 466.[3]

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[3]LASCHER AT LARGE (symbol Tiger) at 467 quote: "Re-Illusionment —Speaking of settlement, I am delighted to digress to recount an incident our profession should hear about. About 9:30 one morning recently, I settled a long and bitterly contested case on the telephone. A principal ingredient of the deal was my side's dismissing its pending proceeding for appellate review of a crucial order. Fifteen minutes later . . . my mail arrived. In it was the decision against us. . . . I picked up the telephone and called Jack back, telling him that I had received the decision but hadn't known about it when we agreed. His answer was: 'we did make a deal a few minutes ago, didn't we? If a case is settled, it's settled.' I wanted to share that. The law is an honorable profession. . . . Court reform? The character of the lawyer is a too easily-overlooked ingredient; and at page 468 Getting Together (with appellate judges) . . . one club I belong to which doesn't require a loyalty oath is the ostentatiously named California Academy of Appellate Lawyers..

SUMMARY

It was arbitrary and discriminatory to reverse the decision that dismissed the appeal. The Courts didn't change the law. The Legislature didn't change the law. In every other published case law decision where the facts were identical to this case, the Courts said ministerial acts or misprisions did not impeach the order of the trial court and the effectiveness of its entry. Petitioner will be greatly damaged if she must again defend her substantial rights in the Courts. The appellants let six months elapse from the date of the decision September 4, 1973 before filing the late notice of appeal. The Courts have said that *sixty days is* more than ample time for a member of the bar to file a notice of appeal in both criminal and civil cases.

CONCLUSION

The California Court of Appeal singled this case out and discriminated against Petitioner and denied Petitioner Equal Protection and Due Process in Violation of the Fourteenth Amendment of the Constitution of the United States when it reversed and vacated its judgment that dismissed the appeal. The appeal was untimely and the Courts have no jurisdiction. For these reasons An Alternative Writ of Prohibition and/or a Writ of Certiorari to review the judgment of the Court of Appeals should issue.

Respectfully submitted,
HELEN FAYE GENERES
2538 Waldon Street
Redding, California 96001
Petitioner.

VERIFICATION

I, HELEN FAYE GENERES, the undersigned state as follows: That she is the petitioner for the Alternative Writ of Prohibition and/or Writ of Certiorari to review the judgment of the Court of Appeal that she has read the Motion and Petition and knows the contents thereof; that the same is true of her knowledge except as to those matters which are therein stated upon her information and belief; and as to those matters, she believes them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Redding, California. October 29, 1974.

HELEN FAYE GENERES
Petitioner.

APPENDICES FOLLOW

Appendix A

Court of Appeal of the State of California

in and for the

THIRD APPELLATE DISTRICT

STICH vs. GENERES, 3 Civil 14526, Shasta No. 45738

By the Court: Respondents' motion is granted and the appeal filed by plaintiff on February 7, 1974 is hereby dismissed.

Dated: April 25, 1974 Richardson, P.J.

The order of this court dated April 25, 1974 dismissing the appeal is hereby vacated, and the motion to dismiss appeal is denied.

Dated: July 18, 1974 Friedman, Acting P.J.

Appendix B

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

(September 12, 1974)

I have this day filed Order ..... HEARING DENIED.
In re 3 Civil No. 14526 STICH vs. GENERES.

Respectfully, G. E. BISHELL, Clerk

Appendix C

This instrument is a correct copy of the original on file in this office. ATTEST's Mar. 19, 1974 Richard C. Brennan, County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Shasta.

By /s/RICHARDSON, Deputy.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SHASTA

Filed Dec. 5, 1973

EUGENE D. STICH, et al *Plaintiffs,* vs. HELEN FAYE GENERES, et al. *Defendants.*	CASE NUMBER 45738

NOTICE OF ENTRY OF JUDGMENT AND CERTIFICATE OF MAILING

You are notified that judgment in this cause was entered in Judgment Book No. 110, Page 18, on December 5, 1973.

RICHARD C. BRENNAN, Clerk of said Court
/s/By D. JOHANSEN, Deputy

State of California, County of Shasta

I, the undersigned, certify under penalty of perjury that I am a Deputy County Clerk of the above entitled Court and not a party to the within action; that I mailed a true and correct copy of the above notice to each of the persons listed below, by depositing such notice in the United States Post Office at Redding, California, enclosed in sealed envelopes with postage prepaid.

Helen Faye Generes, 2538 Waldon St., Redding, CA 96001
H. R. Harrison Smith & Frank W. Shuman
Carr, Kennedy, Peterson & Frost
Cresswell, Martin & Lamborn, 270 Grand Ave. & Lennox, Oakland, CA 94610
Lopez, Kennedy & Srite.

Date: December 5, 1973
By /s/ D. JOHANSEN, Deputy Clerk

Appendix D

This instrument is a correct copy of the original on file in this office. ATTEST: Feb. 15, 1974 RICHARD C. BRENNAN, County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Shasta.

By /s/ D. JOHANSEN, Deputy Clerk

Minute Book 95
Page 162
Date Jan. 7, 1974

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SHASTA—DEPT. I

Hon. RICHARD B. EATON, Judge — Department I
Ron Nelson, Deputy Sheriff — Arlene Lewis, Deputy Clerk

EUGENE D. STICH, et ux, Plaintiffs
vs.
HELEN FAYE GENERES, Defendant

Shasta Case No. 45738

NATURE OF PROCEEDINGS

MOTION FOR NEW TRIAL

H. R. Harrison Smith and Frank W. Shuman, attorneys, appear. Defendant Helen Faye Generes appears in propria persona. Lee A. Lopez, attorney, of the firm of Lopez, Kennedy and Srite, appears for defendant Brown.

Mr. Harrison Smith presents opening argument.

Mrs. Generes presents argument in reply.

THE COURT RULES that the Motion for New Trial is *denied.*

cc: Mr. R. Harrison Smith & Frank W. Shuman, attys.
Mrs. Helen Faye Generes,
2538 Waldon St., Redding, Calif. 96001
Lopez, Kennedy & Srite, Attys.
Carr, Kennedy, Peterson & Frost, Attys.
Cresswell, Martin and Lamborn, Attys.
270 Grand Ave., Oakland, Calif. 94610

/s/RICHARD B. EATON,
RICHARD B. EATON, *Judge*

Appendix E-1

This instrument is a correct copy of the original in this office ATTEST: March 20, 1974 Richard C. Brennan, County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Shasta.

/s/ RICHARDSON, Deputy.

REGISTER OF CIVIL ACTIONS

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SHASTA

EUGENE D. STICH AND JOAN C. STICH,
husband and wife,

vs.

HELEN FAYE GENERES,
and Does I through V, inclusive.

Shasta Case No. 45738

Date: History of Action

JAN. 7, 1974: MOTION FOR NEW TRIAL DENIED.

Appendix E-2

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SHASTA

Clerk's Transcript, Page 537 Filed: March 29, 1974

EUGENE D. STICH, et al., Plaintiffs, vs. HELEN FAYE GENERES, et al., Defendants.	Shasta Case No. 45738

I, Carol Barnard state: On February 6th, 1974 Helen Faye Generes and I checked the following documents in the above action in the Clerk's Office.

1. The Permanent Minute Book Page 162 dated Jan. 7, 1974.
2. A copy of the above in the case file. There was no file stamp. The only date was Jan. 7, 1974.
3. The register of actions carried two entries as follows:
   1. Jan. 7, 1974 Motion for New Trial Denied.
   2. Jan. 7, 1974 Minute Order filed.

I declare under penalty of perjury the above is true and correct Executed at Redding, California. March 29, 1974.

/s/CAROL BARNARD

Appendix F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SHASTA

and in the

COURT OF APPEAL

THIRD APPELLATE DISTRICT

Filed: April 9, 1974.

EUGENE D. STICH, et al., Plaintiffs,	Shasta Case No. 45738
vs.	
HELEN FAYE GENERES, et al., Defendants,	3 Civil No. 14526

Notice: Proceedings on Clerk's certificate

MOTION TO DISMISS APPEAL

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS ACTION: NOTICE IS HEREBY GIVEN that on April 3, 1974 the above entitled Court ordered that the legal aspect of the Court's order be presented to the Third District Court of Appeal on the following facts:

1. The Court's order—the Motion for the New Trial *denied was made on January* 7, 1974.

2. The entry was made in the Register of Civil Actions on January 7, 1974—Motion for New Trial Denied.

3. The original (white copy) of the order motion for new trial denied was denied filed in the Minute Book 95, page 162, and copy mailed to defendant HELEN FAYE GENERES and counsels of all parties bears date of January 7, 1974.

4. The (yellow copy) of the minute order dated January 7, 1974 bears a stamp filed January 9, 1974.

5. Plaintiffs counsels in their paper filed in this action March

4, 1974 on page 2 quote "The court entered the Minute Order that the motion was denied on January 7, 1974.

6. Defendant HELEN FAYE GENERES appeared at the hearing. No one else appeared. All the parties and their counsels of record were served with notice of the hearing.

7. A motion for dismissal of the appeal will be presented to the Third Appellate Court on the grounds that the appeal was untimely. (*Nu-Way Associates* 15 Cal. 3d 926).

Executed at Redding, California. Dated April 6, 1974.

/s/HELEN FAYE GENERES

Carol Barnard signed the April 9, 1974, affidavit of mailing of service on:

Lopez, Kennedy & Srite—P.O. Box 1826, Redding, California

Carr, Kennedy, Peterson and Frost—1640 West St., Redding, California

Cresswell, Martin & Lamborn — 270 Grand Ave., Oakland, California 94610

*Siple and Robison—300 South Mills Road, Ventura, CA 93003.

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*Appellants Stitches counsels.